SEP 30 1948
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 328.

KANSAS CITY TERMINAL RAILWAY COMPANY, A CORPORATION, PETITIONER,

VS.

FRANK A. THOMPSON, TRUSTEE OF AND FOR ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION, AND ZONA GRAHAM, ADMINISTRATRIX OF THE ESTATE OF THOMAS GRAHAM, DECEASED, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI EN BANC AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

No. .....

KANSAS CITY TERMINAL RAILWAY COMPANY, A CORPORATION, PETITIONER,

VS.

FRANK A. THOMPSON, TRUSTEE OF AND FOR ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION, AND ZONA GRAHAM, ADMINISTRATRIX OF THE ESTATE OF THOMAS GRAHAM, DECEASED, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI EN BANC.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Kansas City Terminal Railway Company, a corporation, respectfully petitions for a writ of certiorari to review the final judgment and decision of the Supreme Court of Missouri *en banc*, the highest court of that state, affirming on appeal a judgment of the Circuit Court of Jackson County, Missouri, for $20,000 in favor of respondent Graham and against petitioner, and reversing the same judgment against respondent Thompson, in

an action brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*), 53 Stat. 1404 (Tr. 450). The judgment and decision of the Supreme Court of Missouri *en banc* became final on July 12, 1948 (Tr. 486), and petitioner has exhausted its remedies in the courts of Missouri.

OPINIONS BELOW.

The style of the case below is "Zona Graham, Administratrix of the Estate of Thomas Graham, deceased, vs. Frank A. Thompson, Trustee of and for St. Louis-San Francisco Railway Company, a corporation, and Kansas City Terminal Railway Company, a corporation" (Tr. 491). The opinion of the Supreme Court of Missouri *en banc* is reported in *Graham* v. *Thompson et al.*, 212 S. W. 2d 770 (not yet officially reported). A copy of the opinion is found on page 451 of the Transcript. The first opinion of the Supreme Court of Missouri *en banc* (before rehearing) is not reported and is found on page 401 of the Transcript. The opinion of Division Two of the Supreme Court of Missouri (where the case was first argued and decided before transfer to the Court *en banc*) is not reported and is found on page 356 of the Transcript.

STATEMENT OF THE MATTERS INVOLVED.

For convenience, the parties hereto will be hereafter identified as follows: petitioner as Terminal, respondent Thompson as Frisco, and respondent Graham as plaintiff.

Thomas Graham was employed by Terminal as a switchman in its yards at Kansas City, Missouri (Tr. 118). While he was engaged in a switching operation in those yards on August 27, 1943, he was struck and killed

by the engine of a passenger train owned and operated by Frisco over tracks owned by Terminal over which Frisco had a contractual right or license to operate (Tr. 22, 45, 116, 119). Graham and both railroads were engaged in interstate commerce at the time of the death. His administratrix sued both Terminal and Frisco in the state court of Missouri under the Federal Employers' Liability Act (Tr. 2), and, pursuant to a jury verdict, obtained a $20,000 judgment against both carriers (Tr. 324).

No negligence against Terminal was ever alleged or proved. The only negligence ever charged or proved was against Frisco alone for the failure of its engineer to warn the deceased after he was actually seen in a position of imminent peril near the track (Tr. 2, 261, 465). Terminal was joined as a defendant (Tr. 3), and the case was submitted to the jury against it (Tr. 260, 274), upon the theory that, because of the license by Terminal to Frisco to use and operate over tracks owned by Terminal (Tr. 40, 46), the Missouri so-called "lessor-lessee" statute made Terminal liable under the Federal Act to the administratrix of its employee for the sole negligence of its licensee. The Missouri statute (Mo. R. S. A., Sec. 5163) is hereinafter set out (p. 10), but in substance, it provides that a railroad leasing or licensing the use of its tracks shall remain liable for the acts of the lessee or licensee and the lessee or licensee shall likewise be liable for the acts of the lessor or licensor.

The carriers' appeal from the judgment was first argued in Division Two of the Supreme Court of Missouri, where the judgment was unanimously affirmed against both railroads (Tr. 355). Presumably because a federal question was involved, the case was transferred to the Court *en banc* (Tr. 392) where, after argument, the judgment was reversed against both carriers (Tr. 400),

one Judge dissenting and one dubitante (Tr. 413). A rehearing was granted (Tr. 449), and upon re-argument, the Court *en banc*, two Judges dissenting (Tr. 466), finally affirmed the judgment against Terminal and reversed it as to Frisco (Tr. 450). This petition to review that judgment of the Court *en banc* follows its denial of Terminal's motion for rehearing (Tr. 486).

Graham was the pinpuller in a Terminal switch crew and was killed at 4:45 p. m. on August 27, 1943 (Tr. 116, 119). The crew assembled for work that morning in Terminal's Mill Street yard in Armourdale, Kansas City, Kansas, and left this yard about 8:00 a. m. with a Diesel switch engine (Tr. 120) and eighteen cars (Tr. 118) for Terminal's Blue River yard in Kansas City, Missouri, to switch various industries in Missouri and to return later to the Mill Street yard (Tr. 118, 141). Graham was in Missouri at the time of his death, standing near mainline Track 2 over which Frisco's passenger train was moving into the Union Station (Tr. 22). He was passing signals to the fireman of his switch engine coming out of a switch track from American Sash and Door Company to mainline Track No. 1 with some cars picked up there, one of which was Southern Pacific No. 82160 (Tr. 119). This car was under a waybill (or order) from American Sash and Door Company to Frisco to move it to its consignee, Home Building Corporation, at Dodson, Missouri (Tr. 64, 65), and was taken by Terminal's switch crew after the accident to Rosedale, Kansas, where it was delivered at 11:00 p. m. to Frisco (Tr. 67), who in turn delivered it by its train to Dodson (Tr. 65, 68).

Graham's crew had also previously picked up in Missouri an empty Pennsylvania car No. 95515 and delivered it after the accident to Frisco in Rosedale, Kansas. This car had originated at North Little Rock, Arkansas, loaded

and consigned to Dascomb-Daniels Lumber Company at Kansas City, Missouri, and had been transported from Brewster, Arkansas, to Kansas City by Frisco and delivered to Terminal for delivery to the consignee on August 19, 1943. After it was delivered empty to Frisco on August 27, it was returned to the Pennsylvania in St. Louis by Frisco's train No. 1528 on August 30, 1943 (Tr. 61, 63, 68-71; Exs. 22, 23).

Both plaintiff and Terminal contended in the trial court and in the court below that the deceased was, by virtue of the Missouri lessor-lessee statute, also an employee of Frisco within the meaning of the Federal Employers' Liability Act. If he was, Terminal then conceded that, by virtue of the same state statute, if Frisco was also negligent, Terminal was liable with it to plaintiff under the Federal Act, although Terminal was itself not negligent. If Frisco was however not liable under the Federal Act, Terminal then claimed that it likewise was not liable under that Act (Tr. 103, 105, 275, 422, 429, 451, 480, 484). Frisco claimed below that the Missouri lessor-lessee statute did not have the effect of making Graham its employee, and that, since Graham was not in fact employed by it, his administratrix had no right of action against it under the Federal Act (*e. g.* Tr. 10, 104, 451). Terminal and Frisco also claimed below that the latter was not negligent, but that issue has now been resolved in plaintiff's favor (Tr. 465), so that the sole negligence of Frisco as the proximate cause of Graham's death has been finally and conclusively established by the jury and by the Supreme Court of Missouri. That court, however, has erroneously held (Tr. 463) that, notwithstanding Terminal's total lack of negligence and Frisco's established negligence, Terminal is nevertheless the only one liable to plaintiff under the Federal Act for the sole negligence of Frisco, because the state statute, held by that court to be superseded by the Federal Act

to relieve Frisco from liability under that Act was, for some undisclosed reason, held not superseded as to Terminal's liability, so that non-negligent Terminal is alone liable for its lessee's sole negligence. This is a very unjust and prejudicial result, for it requires an admittedy non-negligent carrier to pay damages for a death solely caused by the proved negligence of another carrier, and at the same time relieves the negligent carrier from liability under the Federal Act. If the Supreme Court of Missouri is right in saying that the state lessor-lessee statute is superseded by the Federal Act for the purpose of determining Frisco's liability, then the state statute must likewise be superseded by the Federal Act for the purpose of determining Terminal's liability. Absent such a state statute, Terminal was not negligent, and since liability under the Federal Act must be predicated solely upon negligence, plainly Terminal cannot here be liable under that Act. Either both Terminal and Frisco are liable to plaintiff under the Federal Act, or neither is.

The matters involved, therefore, are: (1) whether the Missouri statute should be given effect under the Federal Employers' Liability Act in determining who is an employee of what carrier, and therefore to make Frisco liable under the Federal Act; (2) whether, if so, the proper effect of the state statute in this case is to make Graham the employee of Frisco; and (3) whether, if not, Terminal may nevertheless be held liable under the Federal Act for the sole negligence of Frisco when Terminal itself was not negligent.

JURISDICTION.

This action arose and was determined under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*), 53 Stat. 1404, for damages for the death of a switch-

man employed by Terminal. The Supreme Court of Missouri *en banc* affirmed a $20,000 judgment in favor of his administratrix against Terminal and reversed it against Frisco (Tr. 450), holding that the administratrix had no right of action under the Federal Act against Frisco because the deceased was not in fact employed by it (Tr. 463), and that the administratrix could recover against Terminal under the Federal Act, although it was not negligent (Tr. 465). The jurisdiction of this Court to review the judgment below is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Secs. 344 (a) and (b) and 350), and under Section 1257 (3), of Title 28, United States Code, (Act of June 25, 1948, Public Law 773, 80th Cong., 2nd Sess.). The judgment of the Supreme Court of Missouri *en banc*, the highest court of that state, was entered on May 27, 1948 (Tr. 450), and Terminal's motion for rehearing was denied by that court on July 12, 1948 (Tr. 486), making the judgment final.

The federal question was raised in the trial court by the pleadings (Tr. 2-11), by objections to the evidence (*e. g.* Tr. 42-44, 49, 62, 102-107) and to the instructions to the jury (Tr. 263, 275), and by appropriate post trial motions (Tr. 326, 333, 339). The same matters were raised by assignments of error, argued, and decided in the court below, that court deciding the federal question in favor of Frisco and against Terminal (Tr. 356, 367, 401, 416, 422, 451, 478), so as to deny to Terminal rights to which it was entitled under the Federal Employers' Liability Act.

The cases believed to sustain jurisdiction are:

North Carolina R. R. Co. v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591.

Southern Ry. Co. v. *Lloyd*, 239 U. S. 496, 60 L. Ed. 402.

New York Central R. R. Co. v. *Winfield*, 244 U. S. 147, 61 L. Ed. 1045.

STATUTES INVOLVED.

Section 51 of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51) and Sec. 5163, Mo. R. S. A., are reproduced in full in Appendix A to the supporting brief. The relevant provisions of the Federal Employers' Liability Act are:

> Every common carrier by rail while engaging in commerce between any of the several States * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow * * and children of such employee; * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * *.

The relevant provisions of the Missouri statute are:

> * * And whenever any * * railroad * * shall lease its road or tracks or any part thereof to any other company or corporation, or shall license or permit any other company or corporation, under any running agreement, to run cars, engines or rolling stock upon its road or track, in this state, the company or corporation so leasing its road, or such part thereof, to such other company or corporation, or so licensing or permitting the use of its road or track by such other company or corporation, shall remain liable for all acts * * claims, demands, judgments and liabilities of the lessee or licensee * * the same as if it (the lessor or licensor) operated the road, or such part thereof, itself; and such lessee or licensee shall likewise be held liable and may * * be sued in all cases and for the same causes, and in the same manner, as if operating its own road: *Provided, however,* that a satisfaction in full of any claim or judgment by either of such corporation or company, shall discharge the other.

> And suit may be brought upon any such claim * * or liability against either the corporation to whom any such * * lease * * has been made, * * or against the corporation so * * leasing * * or against both such corporations, jointly, at the option of such claimant, * *.

QUESTIONS PRESENTED.

1. Can the Missouri statute making the lessor or licensor and the lessee or licensee liable for the negligence of the other properly be given effect under the Federal Employers' Liability Act in this case to make Graham, the actual employee of the licensor, also the employee of the licensee for the purpose of this Federal Act suit, *or* does the Federal Employers' Liability Act require in all circumstances that a contractual relation of employer and employee exist in fact between the carrier and the injured or deceased employee to the complete exclusion of the effect of a state statute otherwise altering the relation?

2. If the state statute can not be given effect in determining who is an employee of what carrier under the Federal Employers' Liability Act, can the non-negligent licensor, be held liable under that Act to its employee for its licensee's sole negligence by the device of enforcing the licensor's own liability created by that state statute and not enforcing the licensee's liability created by the same statute, *or* must not recovery under the Federal Act be predicated solely upon the employer's negligence?

Analysis of the Opinions Below.

This case has had a unique history in the Supreme Court of Missouri, having been there decided three times with three different results, to two of which there were

dissents. It was first argued in Division Two of that Court where, on December 9, 1946, the judgment of the trial court was *affirmed* against both carriers by the three Judges and the three Commissioners in that Division (Tr. 355). The basis of that opinion by Commissioner Barrett (Tr. 356) was that there was no conflict between the Federal Employers' Liability Act and the Missouri lessor-lessee statute, Congress not having said precisely who was an employee of what carrier, so that the Federal Act did not abrogate or supersede the state statute and was not enlarged by giving it proper effect; and that the state statute defined the licensee's liability as that of the licensor's with the effect in this case of making Graham the employee of both carriers. This opinion was ultimately adopted as the dissenting opinion by the two Judges who dissented from the final decision of the majority of the Court *en banc* (Tr. 467). After the decision in Division Two, the case was transferred to the Court *en banc*, presumably because of the federal question involved (Tr. 392), and after argument, a majority of five of that Court, one Judge dissenting and one dubitante (Tr. 413), *reversed* the judgment on September 8, 1947 as to both railroads (Tr. 400). The basis of that majority opinion was that the Federal Employers' Liability Act superseded all state laws with respect to the liability of carriers to their employees, including the Missouri lessor-lessee statute; that under the Federal Act, a contractual relation of employer and employee in fact must exist before a suit could be maintained; and that, since Graham was not in fact employed by Frisco, his administratrix had no right of action under the Federal Act against it (Tr. 401). The majority also held in that opinion (Tr. 412) that, since there was no negligence proved on Terminal's part, it was not liable to plaintiff under the Federal Act because, under that Act, the lia-

bility of the employer was predicated solely upon its own negligence. Thereafter, upon plaintiff's motion, rehearing was granted (Tr. 449), and, after further argument, a third and different result was reached. The judgment was *affirmed* against Terminal and *reversed* against Frisco (Tr. 450), two Judges dissenting (Tr. 466). The same majority's denial of Frisco's liability under the Federal Act was based upon the same grounds as its first opinion—namely, that the Federal Act superseded and abrogated the state lessor-lessee statute and required the existence of a contractual relation of employer and employee in fact, and that since no such relation existed between Graham and Frisco, plaintiff had no right of action under the Federal Act against that carrier (Tr. 463). As to Terminal, the majority of the court *en banc* completely *reversed* the position taken in its first opinion, and held Terminal liable for the judgment, even though it admittedly was itself not negligent (Tr. 463). The precise grounds of this strange result are difficult to perceive. There seem to be two—and both are clearly wrong.

The first ground is apparently found in this conclusion by the court (Tr. 463): "* * Terminal admitted * * that if Frisco was negligent the case was one to be submitted to the jury." This is a bald misstatement of the record and of Terminal's theory of the case. Terminal admitted always, but admitted only, that, *if Frisco were under the Federal Act* as to plaintiff and were also negligent, Terminal was then also liable to plaintiff for Frisco's negligence, because of the state statute. Terminal always claimed (as now) that Frisco was under the Federal Act because of the state statute. But Terminal has never claimed or admitted that it would be liable under the Federal Act if Frisco were not also liable under that

Act. This was made perfectly clear during the trial and should have been clear to the Missouri Supreme Court (*e. g.*, Tr. 422, 429, 480, 484). On the first day of trial Terminal stated to the trial court:

> * * * Terminal's position is that these two railroads are joint employers; the employees of one are the employees of the other, by virtue of the statute and by virtue of the decision of the Supreme Court of the United States (Tr. 103) * * *
>
> *If there is no cause of action against the Frisco, there is no cause of action against the Terminal* (Tr. 105) (Emphasis ours).

Plaintiff's instruction 4 (Tr. 274) authorized the jury to find Terminal liable if they found Frisco negligent. To the giving of this instruction Terminal objected (Tr. 275) because "it * * is an improper statement of the law." Terminal's position always was (*e. g.*, Tr. 29, 103, 105, 275, 422, 429, 480, 484) that both railroads are liable under the Federal Act, or neither is, because the state statute cannot be held ineffective so as to release Frisco and effective to hold Terminal.

The second ground of holding Terminal liable is apparently the court's conception of the law. It declares (Tr. 463): "As Frisco's lessor, Terminal is liable under the Federal Act for the death of its own employee if Frisco was negligent." This purports to be a naked declaration of law, but as a statement of the law of this case, it is clearly wrong. Terminal is not liable under the Federal Act unless it was negligent. It was not negligent—unless it was responsible for Frisco's negligence—and the state statute making it responsible was held to be superseded by the Federal Act. Therefore it should not be liable to plaintiff—unless Frisco is also liable. The state statute is either super-

seded as to both or not superseded as to either. The result reached by the Court below violates the express language of the Federal Act.

Reasons Relied Upon for Issuance of Writ.

1. The Supreme Court of Missouri *en banc* has decided important and substantial questions under the Federal Employers' Liability Act not heretofore precisely decided by this Court and in a manner unquestionably contrary to that in which this Court would have decided them. Those questions are whether an employee of a lessor or licensor railroad may recover damages against the lessee or licensee railroad under the Federal Act for the sole negligence of the lessee or licensee in view of a state statute making the lessor and lessee railroads each liable for the negligence of the other, and if not, whether the employee of the lessor or licensor railroad may recover damages under the Federal Act against the non-negligent lessor or licensor alone for the sole negligence of the lessee or licensee. These questions require an authoritative determination by this Court of the proper effect under the Federal Act to be given rights and liabilities created by state lessor-lessee law which are different from the conventional relations and liabilities of the parties under the Federal Act.

2. The opinion of the Supreme Court of Missouri *en banc* is in direct conflict with controlling decisions of this Court holding that state law may properly create an employer-employee relation for the purposes of suit under the Federal Act where none in fact exist except for state law.

North Carolina R. R. Co. v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591;

Southern Ry. Co. v. *Lloyd*, 239 U. S. 496, 60 L. Ed. 402;

and with the following decisions of the Circuit Courts of Appeals recognizing that state law may properly alter the rights and liabilities of the parties under the Federal Act in lessor-lessee cases:

Kansas City Southern Ry. Co. v. *Nectaux*, (5 Cir.) 26 F. 2d 317.

Stevenson v. *Lake Terminal R. Co.*, (6 Cir.) 42 F. 2d 357.

3. The opinion of the Supreme Court of Missouri *en banc* is in direct conflict with the decisions of the courts of other states holding that state law similar in effect to the Missouri lessor-lessee statute must be enforced under the Federal Act:

Armstrong v. *Chi. & I. R. Co.*, 350 Ill. 426, 183 N. E. 478.

Wilson v. *Terminal R. Ass'n*, 333 Ill. App. 256, 77 N. E. 2d 429.

Barnes v. *Red River & G. R. R. Co.*, 14 La. App. 188, 128 So. 724.

Logan v. *North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959.

Lloyd v. *North Carolina R. R. Co.*, 162 N. C. 485, 78 S. E. 489; 166 N. C. 24, 81 S. E. 1003; 239 U. S. 496, 60 L. Ed. 402.

4. The opinion of the Supreme Court of Missouri *en banc* is in direct conflict with the controlling decisions of this Court holding that recovery under the Federal Act must be predicated solely upon negligence.

Tenant v. *Peoria & U. R. Co.*, 321 U. S. 29, 80 L. Ed. 520.

New York Central R. R. Co. v. *Winfield*, 244 U. S. 145, 61 L. Ed. 1045.

It is essential that the writ be granted to determine important and substantial questions regarding the proper interpretation of the Federal Employers' Liability Act and

its precise effect upon the Missouri lessor-lessee statute and similar state law elsewhere which creates rights and imposes liabilities different from the usual relations of the parties under the Federal Act.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of this Court directed to the Supreme Court of Missouri *en banc* to the end that the judgment of that Court in this case may be reviewed and that upon such review, this Court reverse the judgment below, and for such other and further relief as to this Honorable Court may seem proper.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF CASE.

The facts, the opinions below, the jurisdiction of this Court, and the statutes and the matters involved have been sufficiently described in the petition so that they will not be repeated here.

The parties will be identified in this brief as follows: petitioner as "Terminal," respondent Thompson, Trustee, as "Frisco," and respondent Graham as "plaintiff." Terminal and Frisco will sometimes for convenience be identified as "lessor" and "lessee" because they are so called in the opinions of the Supreme Court of Missouri, and because those terms are frequently used in the reported cases. Technically, however, the real relationship between Terminal and Frisco is that of licensor and licensee of trackage rights under an operating agreement.

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Missouri *en banc* erred:

1. In holding that the Federal Employers' Liability Act superseded the Missouri lessor-lessee statute to render it ineffective in this case for the purpose of making the employee of the non-negligent lessor the employee of the negligent lessee, and in holding that Frisco was not liable under the Federal Act.

2. In holding that the Federal Employers' Liability Act requires for the maintenance of a suit under it the

existence of a contractual relation of employer and employee in fact to the exclusion of a state statute altering that relation in a lessor-lessee case.

3. In refusing to give proper effect to the state statute, contrary to *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591, which, we claim, makes Graham the employee of Frisco for the purpose of this suit, and in holding Frisco was not liable under the Federal Act.

4. In holding that the non-negligent lessor was liable to its employee under the Federal Employers' Liability Act for its lessee's sole negligence.

5. In refusing to hold that, if the negligent lessee was not within the Federal Employers' Liability Act as to plaintiff, the non-negligent lessor was likewise not liable under that Act.

6. In nullifying the effect of the state statute in determining the lessee's liability under the Federal Employers' Liability Act and in giving the same statute full effect in determining the lessor's liability under that Act.

SUMMARY OF THE ARGUMENT.

The Missouri Supreme Court, in its final opinion, held that Terminal was liable under the Federal Employers' Liability Act for the negligence of Frisco, although no negligence of Terminal was alleged or proved. At the same time, it held that Frisco was not liable under the Federal Employers' Liability Act, although negligence on its part was alleged, proved and found by the jury. In so holding, the court below necessarily ruled that the Missouri statute is controlling in determining for whose negligence Terminal is responsible under the Federal Act,

but that the Missouri statute is not controlling in determining who is Frisco's employee under the Federal Act. In other words, the court, in the same breath, held that the Missouri statute must be applied in deciding whether Terminal is responsible under the Federal Employers' Liability Act, but that it should not be applied in deciding whether Frisco is responsible under the Federal Employers' Liability Act. These conclusions are contrary to the conclusions of this Court and the decisions of the Circuit Courts of Appeals of two different circuits and to the decisions of several State courts. They are expressly repudiated by the Appellate Court of Illinois in a case involving the Federal Employers' Liability Act and similar State law. It is plain that the conclusions of the Missouri Supreme Court are unsound. Either judgment must go against the negligent defendant if the non-negligent defendant is to be held liable, or, on the other hand, if the negligent defendant is to go free under the Federal Act, then the non-negligent defendant must also go free and the parties be left to their rights under the law of the State of Missouri independently of the Federal Act. The absurdity of the result reached by the Missouri Supreme Court is obvious.

Because of the importance of settling the construction to be given to the Federal Employers' Liability Act and the effect of the various state lessor-lessee statutes in cases arising under the Federal Employers' Liability Act, and, because of the conflict of the decision of the Missouri Supreme Court with the previous decisions of this Court, of the Circuit Courts of Appeals and of the courts of other states certiorari should be granted in this case and the judgment of the Supreme Court of Missouri should be reversed.

ARGUMENT.

I.

The Missouri lessor-lessee statute must be given full effect in determining who is an employee of what carrier under the Federal Employers' Liability Act so that here Graham was the employee of Frisco, and the Supreme Court of Missouri erred in holding that the Federal Act superseded the state statute.

The decision below was grounded upon the broad holding that the Federal Employers' Liability Act supersedes the Missouri lessor-lessee statute, the effect of the claimed application of which in this case was characterized as an effort to "enlarge" and "piece out" a right of action under the Federal Act (Tr. 454, 456). Presumably, had the Court below not thought the state statute repugnant to the Federal Act, it would have agreed that the former's effect otherwise was to make Graham an employee of Frisco. The Court below is wrong in its basic conclusion—as this Court has held. There is no conflict between the Federal Act and the Missouri statute, and the latter must be fully applied in a Federal Act case with the effect here of making the employee of the lessor the employee of the lessee.

North Carolina R. R. Co. v. Zachary Compels This View.

The Federal Employers' Liability Act became effective on April 22, 1908 (45 U. S. C. A., Sec. 51). On February 2, 1914, this Court unanimously held that, if *under state law*, the lessor is responsible for the negligence of the lessee, the employee of the latter is the employee of the

former within the Federal Employers' Liability Act so that he may properly sue the lessor under that Act. *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591. Conversely, if under state law, the lessee is liable for the negligence of the lessor, the employee of the latter is the employee of the former for Federal Act purposes. This Court held in the Zachary case that whether or not the lessor was responsible for the negligence of the lessee was a matter *for state determination* (see also *Chi., B. & Q. R. Co.* v. *Willard*, 220 U. S. 413, 422, 55 L. Ed. 521), and that if local law retained the lessor's liability for the lessee's negligence, the legal consequence under the Federal Act was that the employee of the lessee became the employee of the lessor for the purpose of suit under that Act. Similarly, if local law imposes liability upon the lessee for the negligence of the lessor, the employee of latter may maintain a Federal Act suit against the lessee. In the Zachary case, Burgess, employed by the Southern Railway, was killed by the negligence of his employer, which operated under a lease upon tracks owned by North Carolina Railroad. Under North Carolina law, the lessor was responsible for the negligence of the lessee. His administratrix sued both the Southern and the North Carolina at common law, and the North Carolina contended that the action could only be maintained against it under the Federal Employers' Liability Act. This Court agreed, Mr. Justice Pitney saying, l. c. 258:

> It is plain enough, however, that the effect of the rule thus laid down [local law], especially in view of the grounds upon which it is based, is, that * * such a lease * * constitutes the lessee the lessor's substitute or agent, so that for whatever the lessee does or fails to do, * * the lessor is responsible. This being the legal situation under the local law, it seems to us that it must and does result, in the case before us, that the lessor is a "common carrier by

> railroad engaging in commerce between the States," and that the deceased was "employed by such carrier in such commerce," within the meaning of the Federal Act; * * (brackets ours).

The accepted doctrine of this case is and has always been that state law—statutory or common, validly existing to prevent the evasion by a railroad of its charter obligations to the public (*Chi., B. & Q. R. Co.* v. *Willard, supra; Clark* v. *Atchison, T. & S. F. Ry. Co.*, 319 Mo. 865, 6 S. W. 2d 954)—by which lessor and lessee railroads each remain liable for the negligence of the other, is to be given its intended effect in determining who is an employee of a lessor or of a lessee carrier in a suit under the Federal Employers' Liability Act. The case is thoroughly embedded in the law of this Court and of the inferior federal courts and of the various state courts, and has heretofore been uniformly applied by all courts without question.

In 1920 Mr. Justice Pitney expressly placed the stamp of this Court's sanction upon its prior opinion in the Zachary case in *Hull* v. *Philadelphia & R. Ry. Co.*, 252 U. S. 475, 64 L. Ed. 670. Hull was generally employed by Western Maryland, but, at the time of his death in Pennsylvania negligently caused by Philadelphia and Reading, was doing switching for that road. There was an agreement between the two carriers permitting each to use the tracks of the other, but there was no state law attaching any legal consequences to such an arrangement. Hull's administratrix sued the Reading under the Federal Act in the Maryland state court, where judgment went against plaintiff on the ground that Hull was not employed by the Reading. This Court affirmed, holding that Hull was not a "loaned servant," and that the bare agreement between the carriers did not make Hull the employee of the Reading. The author of the Zachary opinion said, l. c. 480:

> *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, is cited, but is not in point, *since in that case the relation of the parties was controlled by a dominant rule of local law*, to which the agreement here operative has no analogy (Emphasis ours).

Thus this Court has unequivocally said that the "relation of the parties" (*i. e.*, the rights of the employee and the corresponding liabilities of the carriers for injury or death in interstate transportation) *can be* and *is* "controlled" by a "dominant rule of local law" in the lessor-lessee case. Clearly the Missouri statute, originally enacted in 1870 (*Fleming* v. *Louisiana & M. R. R. Co.*, 263 Mo. 180, 172 S. W. 355) and applied universally by the Missouri courts during the intervening years, is a "dominant rule of local law," to which this Court has at least three times said effect must be given in determining the rights of the parties under the Federal Act.

In 1915 (between the Zachary and the Hull cases) *Southern Ry. Co.* v. *Lloyd*, 239 U. S. 496, 60 L. Ed. 402 was decided. There this Court approved and applied its Zachary decision of one year earlier. Lloyd sued his employer, the Southern, and its lessor, again the North Carolina Railroad, under the Federal Act in the North Carolina state court for the negligence of the Southern. That road removed the case to the federal court on the alleged ground of fraudulent joinder of the lessor. Plaintiff thereupon took a non-suit as to the North Carolina and appealed to the Supreme Court of North Carolina. That court held the removal improper and remanded the case for trial in the state court (162 N. C. 485, 78 S. E. 489). Plaintiff then secured a judgment against both railroads, and the North Carolina Supreme Court affirmed (166 N. C. 24, 81 S. E. 1003). On certiorari, this Court also affirmed, holding *first*, that no right of removal existed in Federal Act cases, regardless of divers-

ity of citizenship or fraudulent joinder, and *second*, that the joinder of the lessor was not fraudulent because it was liable for its lessee's negligence. Mr. Justice Day said l. c. 499:

> * * it is apparent that the plaintiff sought to recover under the Federal Employers' Liability Act, joining both railroad companies upon the theory that the lessor company remained liable under the law of North Carolina upon the cause of action asserted by the plaintiff. See *North Carolina R. R.* v. *Zachary*, 232 U. S. 248. On the face of the petition *a case was made* invoking the jurisdiction of the state court *to recover under the Federal act, because of the negligence charged* (Emphasis ours).

Thus within a six year period this Court three times recognized that state law defining the responsibilities of the lessor and the lessee to the employee of the other *can* and *must* be made effective in Federal Act cases. Before the Zachary case, this Court had sustained the propriety of a state's regulation of lessor and lessee liabilities in this manner (*Chi., B. & Q. R. Co.* v. *Willard, supra*), and the Zachary, Lloyd and Hull cases simply gave proper effect to that regulation under the Federal Act. These cases make it clear that, if a state chooses to guarantee the performance of charter obligations by imposing liability upon a lessor and a lessee each to the other's employee, that liability must be recognized and enforced in Federal Act cases.

The Circuit Courts of Appeals have always applied the Zachary case to give effect to local lessor-lessee law under the Federal Act. *Kansas City Southern Ry. Co.* v. *Nectaux*, (5 Cir.) 26 F. 2d 317, is illustrative. Nectaux, employed by Kansas City Southern, was injured in Louisiana by the negligence of Gulf Coast Line to which Kansas City Southern leased the use of its tracks. Louisi-

ana law permitted recovery by the employee of the lessor against the lessor for the negligence of the lessee. Nectaux' suit under the Federal Act against Kansas City Southern was upheld, Judge Foster saying l. c. 319:

> *A rule of local law imposing liability may be enforced in suits under the Federal Employers' Liability Act. North Carolina R. R. Co. v. Zachary,* 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591, Ann. Cases, 1914C., 159.
>
> It is reasonably certain that appellant is the real owner of the road * *; and there could be no doubt that the Gulf Coast Line occupied the position of its licensee * * *so as to bring the employees of appellant within the rule adopted in Louisiana* (Emphasis ours).

The significance of this case is that the Fifth Circuit Court of Appeals felt obligated under the Zachary case to enforce in the Federal Act suit the local law of Louisiana changing the conventional liability of the employer under the Federal Act for its negligence only. If local law can properly be given that effect under the Federal Act, cannot the same local law be also properly given effect to make the employee of the lessor the employee of the lessee? In the one case, the liability of the lessor is extended beyond the conventional requirement of the Federal Act; in the other, the liability of the lessee is likewise increased to the same extent. Local law, if effective at all, should be uniformly effective, and, if ineffective at all, should be uniformly ineffective. It can not be applied to discriminate against the lessor in favor of the lessee.

Stevenson v. *Lake Terminal R. Co.*, (6 Cir.) 42 F. 2d 357, is another recognition of the Zachary case. Stevenson sued the railroad under the Safety Appliance Act for injuries sustained in Ohio resulting from a defective

grab iron. He was employed by National Tube Company, and worked with its cars moving over the railroad's tracks leased to the Tube Company. Plaintiff claimed, among other things, that the use of the tracks by his employer made him the employee of the lessor railroad. This the Sixth Circuit denied on the facts of that case, but it said in effect (l. c. 360) that if Ohio law had made the lessor railroad responsible for the negligence of the lessee Tube Company, plaintiff could have maintained his federal suit against the lessor, because the proper effect of such local law under the Zachary case would have been to make Stevenson the employee of the lessor. The implications of this decision are directly in conflict with the decision below.

The state courts have uniformly given effect to local lessor-lessee law under the Federal Act. The decisions of the Illinois courts are illustrative. Illinois has a lessor-lessee statute similar to that of Missouri. In *Armstrong* v. *Chi. & W. I. R. Co.*, 350 Ill. 426, 183 N. E. 478, the Supreme Court of Illinois, upon the precise authority of the Zachary case, applied the Illinois statute to permit the administratrix of the deceased employee of the lessee to recover under the Federal Act against both the lessee and the lessor for the negligence of the lessor. This case is in direct conflict with the decision below.

The *Armstrong* case was followed by the Appellate Court of Illinois (Fourth District) in *Wilson* v. *Terminal Railroad Association*, 333 Ill. App. 256, 77 N. E. 2d 429 (decided January 26, 1948, which was after the first two opinions of the Missouri Supreme Court in this case had been handed down but before the final decision now sought to be reviewed was rendered). The Appellate Court of Illinois reviewed the *Armstrong* case and also the arguments used to support what developed to be the first

decision of the Missouri Supreme Court *en banc* in this case and definitely rejected the philosophy of the Missouri Supreme Court. The Illinois Appellate court held that a deceased employee of a lessee railroad could recover against the lessor under the Federal Act for the negligence of the lessee, on the ground that the Illinois statute made such employee of the lessee the employee of the lessor for the purpose of that suit. That court said l. c. 433:

> To construe the Federal Employers' Act in the narrow manner contended for by defendant, and apparently adopted in the Missouri Supreme Court, we do not believe is either consistent with the language of the Federal Act, nor of the Congressional intent, * *. We believe that the Federal Act being remedial, should actually be liberally construed rather than simply given lip service to such construction and adopting one which does not apply such principle. *We find no justification for the conclusion that Congress intended the Act to apply only where the formal relationship of master and servant exists* and believe that the Illinois Supreme Court in the Armstrong case adopted a conclusion which is proper under the law and the facts (Emphasis ours).

The appellate courts of Louisiana and North Carolina have also applied local lessor-lessee law in Federal Act cases to make the employee of the lessor or lessee the employee of the other for this purpose (cf. *Barnes* v. *Red River & G. R. R. Co.*, 14 La. App. 188, 128 So. 724; *Logan* v. *North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959; *Lloyd* v. *North Carolina R. R. Co.*, 162 N. C. 485, 78 S. E. 489; 166 N. C. 24, 81 S. E. 1003; 239 U. S. 496, 60 L. Ed. 402.

Heretofore, the Supreme Court of Missouri itself had never thought that the relations between the lessor and lessee created by the Missouri statute were unenforce-

able under the Federal Employers' Liability Act, and the history of this case in Division Two and in *en banc*, as evidenced by the three opinions producing three different results and the dissents, indicates the Court's present uncertainty regarding this subject. Both Divisions of the Supreme Court of Missouri have enforced these state created liabilities in Federal Act cases. *Miller* v. *Terminal R. Ass'n*, 349 Mo. 944, 163 S. W. 2d 1034; *Francis* v. *Terminal R. Ass'n*, 354 Mo. 1232, 193 S. W. 2d 909; *Smith* v. *Thompson*, 182 S. W. 2d 63. The Kansas City Court of Appeals has held a suit by the employee of the lessor against both the lessor and the lessee for the negligence of the lessee to be exclusively under the Federal Act. *Spaw* v. *Kansas City Terminal Ry. Co.*, 198 Mo. App. 552, 201 S. W. 927. The court below purports to distinguish these cases upon their facts, but, whether or not they are so distinguishable, they are indistinguishable in principle, for, in each, the Missouri court applies the *Zachary* case to permit the lessor-lessee statute to fix the rights and liabilities of the parties under the Federal Act. The Missouri courts have always construed the state statute to make the lessor and lessee liable for the negligence of the other and the employees of the one the employees of the other, even in Federal Act cases, as these four Missouri cases show. The court below did not overrule these cases or in any way question their construction of the Missouri statute. The court below did not construe, or purport to construe, the Missouri statute in a manner any different from its previous accepted construction. What it held was that, regardless of the accepted construction of the Missouri statute, its effect was excluded by the Federal Act in determining rights and liabilities under that Act. Thus the federal question is sharply presented. But even though the court below said the effect of the Missouri statute was not to be taken into account in this case, and

while it did not give it effect in determining Frisco's liability, it blandly ignored its own pronouncement when it came to determine Terminal's liability and judged its liability by the Federal Act *and* the Missouri statute. This, we claim, was prejudicial error.

The Fallacious Reasons of the Court Below.

The court below bottoms its conclusion that the state statute is superseded by the Federal Employers' Liability Act upon three grounds: (1) the broad language of such cases as *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147, 61 L. Ed. 1045, and *Chi., M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472, 70 L. Ed. 1041, to the general effect that by the Federal Act, Congress took exclusive possession of the field of carriers' liability to employees in interstate commerce, compels the conclusion here that the Missouri statute was included among those state laws superseded by that Act ; (2) *North Carolina R. R. Co.* v. *Zachary* does not really hold what it purports to hold, because the North Carolina law relied upon in that case actually was not what this Court said it was; and (3) this case "is ruled by" such cases as *Hull* v. *Phila. & R. Ry. Co., supra* (252 U. S. 475, 64 L. Ed. 670), and *Robinson* v. *Baltimore & Ohio R. Co.*, 237 U. S. 84, 59 L. Ed. 849 (Tr. 461). We shall analyze these reasons as briefly as possible and demonstrate them to be wholly without merit.

1. Elementary law recognizing the paramount power of Congress in the field of interstate transportation and the general legal consequences of the exercise of that power upon state laws by the enactment of the Federal Employers' Liability Act is scarcely any real aid here in determining whether this particular state statute should be given effect. State laws are sustained under federal legislation over interstate commerce unless there is a

plain and clear conflict. See *Southern Pac. Co.* v. *Arizona*, 325 U. S. 761, 89 L. Ed. 1915; *Gilvary* v. *Cuyahoga V. Ry. Co.*, 292 U. S. 57, 78 L. Ed. 1123; *Woodward* v. *Southern Pac. Co.*, 35 Cal. App. 2d 130, 94 Pac. 2d 1028 (cert. den. 309 U. S. 670, 84 L. Ed. 1016). There are instances in this and other Courts where state laws have been given effect under the Federal Act (*e. g. Frese* v. *Chi., B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131; *Dickinson* v. *Stiles*, 246 U. S. 631, 62 L. Ed. 908; *O'Connor* v. *Chi., M. & St. P. Ry. Co.*, 163 Wis. 653, 158 N. W. 343; aff'd 248 U. S. 536, 63 L. Ed. 408; *St. Louis, I. M. & S. R. Co.* v. *McNamara*, 91 Ark. 515, 122 S. W. 102), and certainly the Zachary case and the many cases heretofore cited applying it are perfect illustrations, *in the very circumstances of this case*, of the harmonious existence of an effective "local law" under the Federal Act. This case, we believe, should be determined by whether the Zachary case and its underlying philosophy is right or wrong. If it is right—as we believe it to be—valid state lessor-lessee law is simply another example of a particular phase of the employee-carrier relation upon which Congress has not specifically legislated so that the matter is left open for the application of appropriate state laws. For this reason, we disregard broad statements respecting the effect generally of the Federal Employers' Liability Act upon state laws, except to point out that, if these generalities had been faithfully applied by the court below, it could never have reached the strange result of holding that the state statute was superseded for the purpose of determining Frisco's liability but not superseded for the purpose of determining Terminal's liability. A logical application in this case of the doctrine that all state laws were superseded by the Federal Act would require here a finding that Terminal was not liable under the Federal Act because the state statute making it negligent was superseded by the Federal Act.

2. Of *North Carolina R. R. Co.* v. *Zachary*, the Court below said:

> Analysis of that case demonstrates it did not turn upon a question of similar or dominant local law * * (Tr. 459).
>
> * * what is referred to in the Zachary opinion as a "local law" * * had nothing at all to do with whether Zachary's intestate * * was also an employee of North Carolina Railroad Company * * (Tr. 460).
>
> * * * that case is no authority here (Tr. 461).

These conclusions are wrong. *Logan* v. *North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959, was the case relied upon by this Court in the Zachary case to ascertain what the local law of North Carolina was. That case held, precisely and unequivocally, just what this Court said it held —that in North Carolina, the lessor was responsible for the negligence of its lessee. The Supreme Court of North Carolina recognized that exact holding of the Logan case when the Zachary case was before it (*Zachary* v. *North Carolina R. R. Co.*, 156 N. C. 496, 72 S. E. 858). The declaration of North Carolina law in the Logan case was grounded on common law principles—not a statute, and *Gooch* v. *McGee*, 83 N. C. 59, 35 Am. Rep. 558, and *State* v. *Rives*, (1844) 5 Ired. (Law), N. C., 297, and the North Carolina statute discussed in those two cases had nothing at all to do with the decision in the Logan case. The Court below was right when it said (Tr. 460) "the opinion in the Logan case was not based on a statute at all." But the fact that no statute was involved does not destroy or weaken or in any way affect the plain authority of the Logan case as a pronouncement of the North Carolina law. Local law enforceable under the Federal Act may either be statutory or common law. In North Carolina, it was common law; in Missouri, it is statutory. The net result in each state is that the lessor is responsible to the em-

ployees of the lessee for the negligence of the lessee, and the lessee is also responsible to the employees of the lessor for the negligence of the lessor, so that the employees of the one are the employees of the other. If that is the state law, this Court has said it must be given effect in Federal Act cases to permit suit against either the lessor or lessee by one not in fact employed by it.

A simple statement of the Logan case makes it plain that the Court below mistakenly interpreted it. The North Carolina Supreme Court specifically held that in that state, a lessor was liable for the negligence of the lessee, not because of any statute, but solely because of common law principles arising out of the lessor's charter obligations to the state. Logan was employed by Richmond and Danville, and was hurt by the alleged negligence of that road while working upon tracks owned by the North Carolina and leased to the Richmond. He sued the North Carolina alone at common law. The trial court sustained a demurrer to the petition, but the North Carolina Supreme Court reversed, holding that the law in that state was that the lessor was responsible to the employees of its lessee for the negligence of the lessee, and therefore a cause of action against the lessor was stated. The Court said:

> * * we * * rest our ruling upon the ground that the original grant of extraordinary privileges still carries with it a correlative obligation to perform the duties which were in contemplation of the State and the corporation when the charter was enacted (l. c. 961).
>
> * * if we apply the test—which we hold to be the true one—that the liability of the lessor grows out of the duty imposed with the privileges in the first instance, the same reason is found to exist for holding it liable to servants of the lessee for injuries sustained by them * * (l. c. 962).

Thus the Logan case categorically declares the North Carolina law, and this Court unhesitatingly gave that law full effect in a Federal Act case to hold the lessor liable thereunder to one not in fact employed by it. The same effect should be given the Missouri statute here to hold the lessee liable to one not in fact employed by it.

The Lloyd cases eighteen years later dispel forever any doubt about the holding in the Logan case and what the local law of North Carolina was. In those cases, the North Carolina Supreme Court again states and applies the rule of the lessor's liability declared in the Logan case, and corroborates this Court's view of what the North Carolina law was at the time of the Zachary case. Lloyd was employed by the Southern, and sued it and its lessor, the North Carolina, under the Federal Act in the North Carolina state court for the negligence of the Southern. *Lloyd* v. *North Carolina R. R. Co.*, 162 N. C. 485, 78 S. E. 489. The Southern removed the case to the federal court on the alleged ground of fraudulent joinder of the North Carolina. Plaintiff thereupon took a non-suit as to it, and appealed to the Supreme Court of North Carolina. It held the removal improper, because, under the Logan case, a cause of action was stated against the lessor. After judgment for plaintiff against both defendants in the state court, defendant appealed to the North Carolina Supreme Court and it affirmed (*Lloyd* v. *Southern Ry. Co.*, 166 N. C. 24, 81 S. E. 1003), holding that the lessor was responsible for the lessee's negligence, and that the Zachary case in this Court was direct authority for the lessor's liability under the Federal Act. On certiorari, this Court affirmed (*Southern Ry. Co.* v. *Lloyd*, 239 U. S. 496, 60 L. Ed. 402), thus a second time giving full effect to North Carolina lessor-lessee law under the Federal Act, and holding that, since that state law made the lessor liable for the lessee's negligence, the joinder of the lessor

was not fraudulent. Thus both before and after the decision of this Court in the Zachary case, North Carolina law *did* make the lessor responsible for the negligence of the lessee and *did* make the employee of the latter the employee of the former for the purpose of a Federal Act suit, and the court below is wrong when it says (Tr. 460) that the "local law" of the Zachary opinion had "nothing at all to do with whether Burgess was the employee of the lessor."

3. The court below said this case is "ruled by" *Hull* v. *Phila. & R. Ry. Co.*, *supra* (252 U. S. 475, 64 L. Ed. 670), and *Robinson* v. *Baltimore & Ohio R. Co.*, *supra* (237 U. S. 84, 59 L. Ed. 849) (Tr. 469). In neither of those cases was there a "dominant rule of local law" (the Hull case, l. c. 480). The Hull case involved a lease, but neither Pennsylvania nor Maryland law made the lessor or the lessee liable for the negligence of the other. The absence of this factor took the case out of the rule of the Zachary case, and required the application of the conventional test to determine the employer-employee relation. Neither a lease nor local law was present in the Robinson case. There a porter employed by the Pullman Company was held not to be an employee of the carrier for the purpose of Federal Act suit. Both cases contain general language indicating that the words "employee" and "employed" in the Federal Employers' Liability Act are used in their natural sense and are intended to describe the conventional relation of employer and employee. This may be usually true, but, in view of the Zachary decision (which this Court in the Hull case said was not there in point because in the Hull case there was involved no "dominant rule of local law"), these words in the Federal Act are not to be so conventionally construed in a lessor-lessee case. Compare *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 120-129, 88 L. Ed. 1170. We fail

to see how the court below concluded that Congress intended an employment in fact in the lessor-lessee case too, when the Zachary case (and others like it) plainly hold that, if by state law the carriers' liabilities as lessor and as lessee to the other's employees are other than normal, that difference must be given effect under the Federal Act. There is nothing in either the Hull or Robinson cases warranting any contrary conclusion.

For all the foregoing reasons, the court below erred in not applying *North Carolina R. R. Co.* v. *Zachary*, and erred in refusing to give the effect to the Missouri statute of making Graham the employee of Frisco for the purpose of this case, so that the court below improperly reversed the judgment on this ground as to Frisco.

II.

If Frisco is not liable under the Federal Act, neither is Terminal, and the Supreme Court of Missouri erred in holding Terminal liable under that Act when admittedly it was not negligent.

The Court below reached the grotesque result of finding Frisco not liable, even though it was proved negligent, and of finding Terminal liable, even though it was proved not negligent (Tr. 463, 465). The basis was that the state statute was ineffective (because superseded) in determining the lessee's liability, but effective (because not superseded) in determining the lessor's liability. This is an arbitrary and discriminatory determination of Terminal's federal rights, particularly when the court below itself said (Tr. 454) that "the Federal Act is controlling, exclusive and supreme with respect to which railroads should be liable thereunder." What the court actually held was that the Federal Act was "controlling, exclusive and supreme" with respect to Frisco's

liability, but not so with respect to Terminal's. A state statute changing the conventional liabilities of the lessor and the lessee to the employee of the other is either superseded for the purpose of determining the liabilities of both, or is not superseded for the purpose of determining the liabilities of either.

Liability under the Federal Act is predicated solely upon negligence. *Tenant* v. *Peoria & U. R. Co.*, 321 U. S. 29, 80 L. Ed. 520; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147, 61 L. Ed. 1045. Terminal was not negligent, and therefore is not liable to plaintiff—if Frisco is not. Either both railroads are liable, or neither is, because the state statute changing their conventional liability is either good as to both or bad as to both. It cannot be ineffective as to one and effective as to the other, the court below notwithstanding.

Kansas City Southern Ry. Co. v. *Nectaux, supra* (26 F. 2d 317), *Miller* v. *Terminal R. Ass'n, supra* (349 Mo. 944, 163 S. W. 2d 1034), and *Francis* v. *Terminal R. Ass'n, supra* (354 Mo. 1232, 193 S. W. 2d 909), are three cases in each of which the courts applied local law under the Federal Act to hold a non-negligent lessor liable under that Act to its employee for the sole negligence of its lessee. In none of those cases was the question involved whether the same local law could be applied to make the employee of the lessor the employee of the lessee for Federal Act purposes. However, if local law can be properly invoked to make an employing carrier liable under the Federal Act when it was not negligent (and therefore not otherwise liable), local law can also be properly invoked to make a lessee carrier liable under the Federal Act when it did not in fact employ the deceased (and therefore was not otherwise liable). If the plain requirements of the Federal Act can be altered by state law in the one respect so as to

predicate a defendant's liability upon the negligence of another, they can also be altered in the other respect so as to make a negligent defendant liable to one not directly employed by it.

The assumption of the court below (Tr. 463) that Terminal admitted that, regardless of Frisco's liability, if Frisco were negligent, Terminal was liable, is simply unfounded in the record. Terminal's position in this respect was stated to the trial court:

> * * Terminal's position is that these two railroads are joint employers; the employees of one are the employees of the other, by virtue of the statute and by virtue of the decision of the Supreme Court of the United States (Tr. 103).
>
> * * *If there is no cause of action against the Frisco, there is no cause of action against the Terminal* (Tr. 105).
>
> * * Terminal * * objects to the giving of Instruction No. 4 [authorizing a finding of Terminal's liability if Frisco were negligent] for the reason it * * is an improper statement of the law (Tr. 275). (Emphasis and brackets ours).

This position was consistently maintained throughout the trial and before the court below. Petitioner has always claimed—and now claims—that Graham was a joint employee of both carriers, and has always conceded—and now concedes—that if so, and if Frisco was negligent, Terminal is also liable to plaintiff, although it was not itself negligent, because of the state statute, for if that statute is effective against Frisco, it is effective against Terminal (Tr. 422, 429, 480, 484). Petitioner has never conceded that it could be liable, if Frisco were not liable. But the court below has, in one breath, held the state law ineffective as to the Frisco, and effective as to Terminal—a result with which it seems perfectly obvious Terminal never agreed.

Because petitioner has been required to respond in damages under the Federal Act without a finding of its negligence, it has been deprived of its substantial rights under the Federal Act, and this Court should review and reverse the judgment below for that reason.

CONCLUSION.

We urge this Court to grant the writ because of the conflict with other decisions, because of the importance of a proper construction of the Federal Employers' Liability Act in view of the state law, and because petitioner has been deprived of its rights under the Federal Employers' Liability Act by the judgment of the Supreme Court of Missouri *en banc* in that:

(1) that court erroneously refused to give effect to the Missouri lessor-lessee statute under the Federal Employers' Liability Act, thereby improperly finding Frisco not liable under that Act; and,

(2) that court erroneously found Terminal liable under the Federal Act although admittedly it was itself not negligent.

Respectfully submitted,

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APPENDIX "A."

45 U. S. C. A., Section 51:

Sec. 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

R. S. A., Mo., 1939, Section 5163:

Sec. 5163. Liability of companies for debts, etc., after sale — consolidation — lease — assignment — suits for recovery authorized. — Whenever any railroad, street railway, terminal or other railway corporation owning, operating, maintaining, managing or running any railway or railroad, of any kind whatsoever, in this state, shall sell, transfer, consolidate, lease or assign any such railroad, or railway, or any part thereof or interest therein, to or with any other railroad, railway, corporation, person or persons, such railroad, railway, corporation, person or persons, and its or their successors and assigns, shall take and hold the same subject to the payment of all judgments, claims, debts, liens and liabilities existing against such railroad, street railway, terminal or other railway corporation, at the time of the sale, transfer, consolidation, lease or assignment thereof. And whenever any such railroad, street railway or other railway company or corporation, or any receiver thereof, shall lease its road or tracks or any part thereof to any other company or corporation, or shall license or permit any other company or corporation, under any running agreement, to run cars, engines or rolling stock upon its road or track, in this state, the company or corporation so leasing its road, or such part thereof, to such other company or corporation, or so licensing or permitting the use of its road or track by such other company or corporation, shall remain liable for all acts, debts, claims, demands, judgments and liabilities of the lessee or licensee; or any sublessee or sublicensee, company or corporation, the same as if it (the lessor or licensor) operated the road, or such part thereof, itself; and such lessee or licensee shall likewise be held liable and may sue and be sued in all cases and for the same causes, and in the same manner, as if operating its own road: *Provided, however,* that a satisfaction in full of any claim or judgment by either of such corporation or company, shall discharge the other. And suit may be brought upon any such claim, debt, lien or

ability against either the corporation to whom any such sale, transfer, lease, or assignment has been made, or with which such consolidation has been had, or against the corporation so selling, transferring, leasing, consolidating or assigning, or against both such corporations, jointly, at the option of such claimant, and if any suit shall be pending against the corporation so selling, transferring, leasing, assigning, at the time of any such sale, transfer, consolidation, lease or assignment, the plaintiff therein may, at his option, and upon motion, have the corporation or person so purchasing, receiving, acquiring or taking, made a party defendant jointly with the other defendant, but such plaintiff's failure to have such corporation made a defendant in the case shall not in any manner prevent or bar such plaintiff from enforcing any judgment obtained in such suit against the corporation so acquiring, purchasing or taking such railroad, or railway, or part thereof, as above provided. And for the purposes of jurisdiction and service of process, the servants, agents, employees, officers and offices of either of such corporations or person shall be held to be the agents, servants, employees, officers and offices of both, and service upon the agent, officer or employee of either corporation, shall be held and deemed sufficient and valid service upon both of such corporations (R. S., 1929, Sec. 4690).